Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973

No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

EVELLE J. YOUNGER,
Attorney General, State of California,
JACK WINKLER,
Chief Assistant Attorney General,
HARLOW SMITH,
Assistant Attorney General,
ALVIN KNUDSON,
Deputy Attorney General,
RONALD H. BEVINS,
City Attorney, City of Buena Park,
CECIL HICKS,
District Attorney,
County of Orange, State of California,
MICHAEL R. CAPIZZI,
Assistant District Attorney,
By ORETTA D. SEARS,
Deputy District Attorney,
Head, Writs & Appeals Section,
P.O. Box 808,
Santa Ana, Calif. 92702,
(714) 834-3600,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Central District of California entered on June 4, 1974, by the Honorables Walter Ely, Circuit Judge; William G. East and Warren J. Ferguson, District Judges, declaring the California Obscenity Statutes (California Penal Code section 311 *et seq.*) to be unconstitutional and ordering Appellants to return to Appellees all materials which had been seized from Appellees' agents as evidence in prosecutions under the state obscenity statutes. Appellants submit this statement to show that the Supreme Court of

the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below.

The following unreported orders and opinions are set forth in the Appendix: (A) opinion of the Federal District Court and judgment, (B) order denying the temporary restraining order and determining that certification for the impaneling of a three-judge court was warranted, (C) order to show cause *in re* contempt, (D) decision of the Appellate Department of the Orange County Superior Court.

Jurisdiction.

Appellants have been informed by the Clerk of the Federal Court that the record on appeal in this matter consists of the procedural history of several cases and shows that as each new complaint was filed that case was automatically tacked on to the ones already pending before the three-judge court. On December 5, 1973, at least *nine* cases were joined together by the three-judge court who on that date heard extensive argument on the issue of the constitutionality of the California obscenity laws. The same record shows that in many of those cases preliminary injunctions and temporary restraining orders had issued and were kept in force until the decision in *Miranda v. Hicks* was entered. All of the cases, as the record on appeal shows, have been declared to be controlled by *Miranda v. Hicks.*

Appellants herein, however, do not base the jurisdiction of this Honorable Court on the happenings and events in those cases except to the extent that those cases show the *injunctive* quality of the judgment which the court alleges to be "declaratory in nature."

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1253 in that this is a case within the purview of that statute for the following reasons:

On November 29, 1973, Appellee Vincent Miranda, doing business as Walnut Properties and Pussycat Theatre Hollywood, a California corporation, filed a "Complaint for Damages, Declaratory Relief and Injunction" pursuant to 28 U.S.C. 1343(3) and (4), 42 U.S.C. 1983, 28 U.S.C. 2201 and 2202, and 28 U.S.C. 2281 and 2284. Appellants were notified of the pending action although they were not served with the summons and complaint until January 14, 1974.

On December 28, 1973, the Honorable Lawrence T. Lydick, District Judge, to whom the case was originally assigned, issued an order denying Appellee's request for a temporary restraining order and for return of the films seized but concluded that:

> The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question. notification and certification in accordance with 28 U.S.C. sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The three-judge court which was convened pursuant to the above certification by its opinion and judgment entered on June 4, 1974 (see Appendix A), held the California Obscenity Statutes to be unconstitutional and although it specifically did not enjoin pending state prosecution, it ordered the return of all evidence seized, further declaring that:

> The court retains full and complete jurisdiction over the parties and the causes of action for all purposes. (See Appendix A, p. 18.)

On August 3, 1974, Judge Ferguson, a member of the three-judge panel, issued a temporary restraining order against further seizures pursuant to the above-retained jurisdiction and ordered Appellants to show cause why they should not be found in contempt for not having returned the seized copies. He further ordered them to show cause why further seizures and prosecutions should not be enjoined both as to "Deep Throat" and as to a new movie, "Devil in Miss Jones," and why all copies seized pursuant to search warrants issued after adversary hearing, on July 29, 30 and 31, 1974, should not be ordered returned. On August 12, 1974, an injunction against further seizures was issued. These orders show that although the Court did not "enjoin" operation of the state laws on paper, it acts in an injunctive manner in enforcing its "declaration."

Notice of Appeal was filed in that court on July 5, 1974. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1253. The recent decision of *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701 (1971), further upholds the jurisdiction of the court to

review the judgment in this case on direct appeal. There, as in the case at hand, properties had been seized in connection with state obscenity prosecutions. There as here:

> Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That court held the Louisiana statute constitutional on its face. . . . Although the three-judge court declined to issue an injunction against the pending or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. 304 F.Supp. 662, 667-670 (1969). the local district attorney and other law enforcement officers appealed. . . .

In ruling that the jurisdiction of the United States Supreme Court was properly invoked, the opinion, at note one, concludes:

> Under 28 U.S.C. §1253 an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." The orders directing the suppression of evidence and the return of the seized material were injunctive orders against the appellants. Thus, we have jurisdiction to review those orders.

Since in the case under review the injunctive orders were justified by the district court solely on the basis that the property ordered returned or to be ordered returned was no longer contraband or evidence of il-

legal activity because of the Federal District Court's declaration that the California statutes are invalid (Appendix A, p. 18) and since the Court considers its declaration of unconstitutionality so binding as to preclude enforcement under penalty of contempt, under the rationale of *Perez v. Ledesma, supra,* both the constitutionality of the California obscenity statutes and the injunctive orders to return are properly reviewable. Also supportive of this Court's jurisdiction to determine both issues is *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 160 (1973).

Additionally, 28 U.S.C. section 2281 specifies that a three-judge court must be convened in an action to secure an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes upon the ground of the unconstitutionality of such statute.

The following cases sustain the jurisdiction of the Supreme Court to review the injunctive orders and the underlying finding of unconstitutionality by stating that if the three-judge court (and, on appeal, the Supreme Court) has jurisdiction by reason of the presence of a substantial constitutional question, its jurisdiction extends to every question of law involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case: *Sterling v. Constantin,* 287 U.S. 378, 393-394 (1932); and cases cited; *California Water Service Co. v. Redding,* 304 U.S. 252, 255-256 (1938); *Public Service Commission v. Brashear Lines,* 312 U.S. 621, 625 (1941); *Zemel v. Rusk,* 381 U.S. 1, 5-6 (1965); *United States v. Georgia*

Public Service Commission, 371 U.S. 285, 287-288 (1963); *Paul v. United States,* 371 U.S. 245, 250 (1963).

Finally, in the case at hand, lack of the lower Federal court's jurisdiction is evident. Where there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States,* 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo,* 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra,* at 478. Conversely, where the plaintiff is clearly entitled to relief, as where the state statute he is attacking is plainly unconstitutional, the Supreme Court may direct the district court to enter an appropriate decree on the merits, even though that court had originally been improperly constituted with three judges. *Bailey v. Patterson,* 369 U.S. 31.

Questions Presented.

1. Whether the *Miller v. California* decision issued by this Honorable Court on July 25, 1974, dismissing "for want of a substantial federal question" an appeal from a post-*Miller* conviction under the California Obscenity Statutes is a decision on the merits as to the constitutionality of the California Obscenity Statutes which is binding on lower Federal courts.

2. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state prosecutions were pending against representative agents of the Appellees.

3. Whether the federal district court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state criminal prosecutions against Appellees had been filed eight days after the three-judge court had been constituted and were pending at the time the court issued its declaratory judgment.

4. Whether the doctrine of equitable abstention is applicable where federal action would have a disruptive effect upon a state's criminal processes and has the effect of encouraging disobedience of validly issued orders of a state court and the further effect of encouraging defendants in state proceedings to refuse to litigate in state courts.

5. Whether the Federal court can properly order Appellants to return items seized under order of validly issued search warrants and which are entered as evidence in cases presently pending in the state courts and which are under the physical *or* constructive custody of the state court.

6. Whether the three-judge court abused its power in making a finding that Appellants had harassed the Appellees without allowing for an evidentiary hearing, ordering the matters submitted on affidavits and determining the factual issue in a manner contrary to the determination of the one judge who under the statute should have been a member of the panel.

10. Whether the court erred in determining that searches conducted under authority of duly issued search warrants constituted harassment as a matter of law.

11. Whether failure to follow the procedures mandated by 28 U.S.C. 2284 vitiates and voids the injunctive orders of the court.

Statutes Involved.

California Penal Code sections 311, 311.2, ***et seq.*** and California Penal Code sections 1526, 1536, 1539, and 1540 are set forth in Appendix E.

Statement of the Case.

Appellee is the owner of a theater located at 6177 Beach Boulevard, Buena Park, Orange County, California. The theater is called the Pussycat Theatre and exhibits motion picture films to adults only. Said theater was open and operating from November 23, 1973, to November 29, 1973.

Appellant Cecil Hicks is and was at all pertinent times the District Attorney of Orange County. Appellant Oretta Sears is and was at all pertinent times a Deputy District Attorney of Orange County. Both Hicks and Sears were charged with the duty of enforcing the provisions of the California Penal Code in Orange County, California.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theatre owned by Appellees in Buena Park, California. Based

on his viewing of the film, Judge Smith felt there was probable cause for believing the film to be obscene and issued a search warrant for the seizure of the film.

That same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was being shown at Appellees' theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film.

Later that day a third seizure of a copy of the film "Deep Throat" was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing, Buena Park Police Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further ordered the officers to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized.

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had been seized pursuant to the three warrants. Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown at Appellees' theater. The officers saw the film and noted that this fourth film was different from the seized

copies. They reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place.

On Monday, November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the movie "Deep Throat". In its order to show cause, the Superior Court of Orange County ordered Appellees to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of Appellees at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. At Appellees' request, at 2:30 p.m. on that same day a hearing was had in Department 21 of the Orange County Superior Court, the Honorable Byron K. McMillan, Judge Presiding, the judge who had issued the order to show cause and temporary restraining order.

Attorney David M. Brown appeared at said hearing on behalf of Appellees. He argued lack of jurisdiction of the Orange County Superior Court to hold such a hearing. He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Question" in which he stated, "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." Judge McMillan of the Orange County Superior Court ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court. The

matter was recessed until the following morning at 9:00 a.m. for the taking of evidence and Mr. Brown was advised that if Appellees made no appearance, the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt and issued an "order of seizure after adversary hearing" directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theatre or which were to be found there in the future, and to bring same before the court. This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

Also on *November 26, 1973,* criminal complaints were filed against the agents of Appellees who were managing the theater and showing the films. Those prosecutions are still presently pending and have been continued at Appellees' request to allow a final determination of these proceedings.

On *November 29, 1973,* Appellees filed the complaint for damages, declaratory relief and injunction. The case was assigned to Judge Warren Ferguson who disqualified himself. (See Appendix F.)

On December 28, 1974, an order denying a temporary restraining order was issued by Judge Lydick of the Federal District Court. The order reflects Judge

Lydick's finding that the record was totally devoid of any showing of wrongdoing by Appellants:

> The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.
>
> In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a

temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. (Appendix B.)

On January 8, 1974, an order designating the Honorables Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for the Ninth Circuit. (The order was forwarded to Appellants on February 8, 1974.)

On January 8, 1974, Mr. Bayley, the manager of Appellee's theater, filed a motion to suppress as illegally seized the four copies of "Deep Throat." On January 15, 1974, Appellees' involvement having come to light, the state criminal complaint was amended to include Appellees.

On January 29, 1974, Appellants filed their answer supported by certified documents and notarized declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order).

On January 29, 1974, the Orange County Municipal Court granted Appellees' motion to suppress as to two of the copies of "Deep Throat." It denied the motion as to the other two copies.

On February 7, 1974, Appellees filed motion to dismiss claim of damages without prejudice and submitted an affidavit in support thereto. At that same time Appellants moved for summary judgment.

On February 15, 1974, Appellants filed notice of appeal from the Orange County Municipal Court's order of suppression.

On March 4, 1974, the Honorable Judge Ferguson granted Appellees' motion to dismiss and denied Appellants' motions as "moot."

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court ordering the issue of "harassment" submitted on affidavits and requesting additional points and authorities on the issue of constitutionality of the state statutes. Neither Appellees nor Appellants submitted additional affidavits so that the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion totally ignoring Judge Lydick's findings, totally ignoring the existence of the adversary hearing in the state court, totally ignoring the criminal proceedings pending in the state court, totally ignoring the fact that one of Appellants, Deputy District Attorney Sears, was improperly named since her sole involvement was the preparation of the state court order to show cause regarding the adversary hearing and concluding that (a) California Penal Code sections 311, *et seq.*, are unconstitutional, (b) that *People v. Enskat*, 33 Cal.App.3d 900, improperly construes the California statute and improperly interprets prior California decisions by the use of "specious arguments," (c) that the "*objective*" facts set forth in the first part of the

opinion clearly demonstrate "bad faith and harassment" and (d) that requiring the state to return *all* copies of the film "might have" some disruptive influence on a possible future prosecution—*or upon prosecutions of others*—but (e) since the state statute has been declared unconstitutional the property is no longer evidence and/or contraband and "it can and is ordered returned." (Appendix A.)

A notice that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b), and 62 would be made on July 1 was filed by Appellants Gourley, Fontecchio, Hafdahl and Harrison on July 14, 1974. Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by the other Appellants. A motion to stay the proceedings was also filed.

Appellants Hicks and Sears felt the wisest course was to follow the advice given by this Court in *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209 (1974), and even though on June 4, 1974, at a time when the Declaratory Judgment was not yet final, the Pussycat Theatre resumed showing of the film "Deep Throat," no search warrants for its seizure were requested.

On July 25, 1974, this Honorable Court issued its opinion in *Miller v. California,* dismissing the appeal for want of a substantial federal question. All decisional laws and logic indicate that opinion to be a declaration that the California Law *is constitutional.*

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures and acknowledged that a valid adversary hearing on the issue of obscenity had been had. (Appendix D.)

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued the search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant and each being the source of a new prosecution against the theater, the employees, etc.

In addition, on July 30, 1974, the state judge, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones" which was being shown at the same theater in conjunction with "Deep Throat." On July 31, 1974, a second search warrant was issued and a second copy seized. This search warrant was issued in conjunction with an order to show cause requesting defendants to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendants' request, and show cause why all copies in the possession of the theater should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing. As to each seizure, state criminal complaints have been filed and are pending.

On Friday, counsel for defendants appeared before the Orange County Superior Court and stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies

of the film in the theater's possession. The state judges issuing the warrants, because of the orders to return evidence in state causes priorly made by Federal District Court Judges, have in *all the above warrants, including the November 23 and 24, 1973, warrants, ordered the seized films returned to the court itself in whose direct possession they presently are.*

On August 1, 1974, a message was left with Appellant Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Appellant Sears or to other Appellants.

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All Appellants were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued in the declaratory judgment of the three-judge court. (See Appendix C.) Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and Appellants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned. (See Appendix C.)

On August 3, 1974, an application for stay was made to the United States Supreme Court.

On August 12, 1974, even though Appellees had requested permission to oppose the Petition for stay and

were thus expected to forego enforcement of the judgment below until the application had been disposed of, they argued for a finding of contempt and for the granting of injunctive relief.

Judge Ferguson, one of the three-judge panel, after hearing argument, indicated that the three-judge court was considering the issue of whether the July 26, 1974, *Miller v. California* opinion of this Court required reversal but further indicated that the issue was a "difficult one" and that he did not know *when* an opinion by that court would be forthcoming.

Thereafter Judge Ferguson vacated the order to show cause *in re* contempt "because" the court still had "under consideration" the issue of whether to grant or deny a stay. Appellees having withdrawn their request for such relief, he vacated the order to show cause why the copies seized on July 29, 30 and 31, 1974, should not be ordered returned and why further criminal prosecutions should not be enjoined.

Judge Ferguson then asked why Orange County authorities had conducted further seizures while the *Miranda v. Hicks* decision was still in effect. Appellants answered that the "declaratory" judgment opinion did not preclude future seizures and prosecutions. Judge Ferguson then stated that the *only* reason why the three-judge court had not issued an injunction was because the Court believed an injunction to be unnecessary. Accordingly, Judge Ferguson ordered Appellants to abstain from further seizures of the movies "Deep Throat" and "Devil in Miss Jones."

THE QUESTIONS ARE SUBSTANTIAL.

I

The Court Below Has Departed From the Accepted and Usual Course of Judicial Proceedings.

The record shows that the case had originally been assigned to Judge Ferguson who disqualified himself. The request for injunction was subsequently submitted to Judge Lydick who, on the affidavits before him, found that an injunction under the Civil Rights Act would have been improper *because* the Appellees had failed to make any showing whatever that Appellants had acted in bad faith. Judge Lydick, however, did determine that a three-judge court should be impaneled to decide the constitutionality of the state statute and duly certified the case. The Chief Judge of the Circuit impaneled *three* judges: William G. East, Warren J. Ferguson and Walter Ely. Since the court was not duly constituted under 28 U.S.C. §2284, it did not have jurisdiction to hear the matter and to grant injunctive relief. 28 U.S.C. §2284 specifies:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

The statutory requirement that the judge to "whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the very purpose of the statute since *that* particular judge is the one who makes preliminary factual determination that a three-judge court is needed. He is also the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded. (See *e.g., Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971); see also *Public Service Commission v. Brashear Freight Lines, Inc.,* 312 U.S. 621, 85 L.Ed. 1083 (1941).) His decisions on most issues of fact will be and are upheld on appeal unless patently erroneous. In a case such as the one at hand, for example, failure to include the judge who called for the convening of the three-judge court resulted in a denial of a constitutional as well as procedural due process. Judge Lydick's opinion absolved Appellants of any wrongdoing. The three-judge court, based on the *same* evidence which was before Judge Lydick, made a finding that the "uncontroverted facts" show harassment. Since a claim for damages which had originally been filed was dismissed without prejudice, the finding of harassment places Appellants in the unenviable position of having had the key issue in a damage suit conclusively determined against them without a hearing on the merits.

Additionally, Judge Lydick's original determination of the issue in Appellants' favor lulled Appellants into a false sense of security and, assuming but not granting a final determination of the issue to have been properly ordered submitted upon affidavits, it caused Appellants to believe no additional affidavits were needed since, as the decision itself admits, the acts of "harassment" consisted of seizures carried out under

authority of search warrants issued by a state judge who, on at least two occasions, was present at the seizure.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory and a court of three judges which does not include the judge who first heard the matter is not a court composed under the statute.

II

The District Court Decided the Case in a Manner Not in Accord With Applicable Decisions of This Court by Failing to Abstain.

A. Whereas the Criminal Proceedings Against the Agents of Plaintiffs Were Pending at the Time the Federal Complaint Was Filed, Federal Court Must Abstain.

In determining that issuance of the injunctive order to return the seized evidence was proper, the District Court sought to distinguish *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuel v. Mackell,* 401 U.S. 66 (1971) by stating that in the case at hand there are no pending state proceedings against the Appellees and by concluding that:

> . . . the fact that there may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief.

The court apparently does not recognize the presently pending prosecutions against Miranda because instituted before impaneling of the three-judge court, but after the filing of the Federal Complaint. Even if this contention is correct, the existence of pending state prosecutions initiated prior to the filing of the federal

action against some of the theater employees cannot be denied. It is shown in the record and is admitted by Appellees' own affidavits. As pointed out by *Allee v. Medrano,* 94 S.Ct. 2191, 2208 (Justice Burger's concurring opinion) where there is an identity of interest between the defendants in the state criminal case and the plaintiffs in the federal action, the applicable standards are those of *Younger v. Harris, supra,* and not those of *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209, 39 L.Ed.2d 505. The identity of interests in the case at hand is self-evident and the ability of Appellees to obtain a vindication of their rights in the state court is obvious since what Appellees are complaining of are the seizures from the theater employees.

Under the rules set forth in *Perez v. Ledesma, supra,* federal intervention either by way of injunction or by way of declaratory relief should issue:

> *Only* in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid convinction and perhaps in other extraordinary circumstances where irreparable injury can be shown . . .

In the case at hand, the record shows that four films were seized because they were different one from the other. Each was seized pursuant to a search warrant and the determination of the existence of substantial differences was made in at least one of the three instances in question by the magistrate *prior* to the issuance of the search warrant. The existence of such differences is further supported by the affidavits which show that Appellees themselves admitted to the existence of more than one version.

The seizures occurred on November 23 and 24. On November 26, an order to show cause was served

on the Appellees ordering them to appear in the State Superior Court for an adversary hearing on the issue of obscenity. Appellees alleged that "bad faith" in this case was further evidenced by the fact that Appellants obtained an *ex parte* temporary restraining order against the showing of the film. Although it is true that such an order was obtained as part of the order to show cause, this Honorable Court should consider the strong protective limitations contained within the order as well as the purpose of the order. The first limitation in the order is a time factor. The order asked Plaintiffs not to show the movie until after a *judicial determination* was held in an *adversary* hearing and provided that the adversary hearing should be had within five days or at any prior time at Appellees' request upon *one hour's* notice to Appellants. Appellees did *in fact* request a hearing on the *same* day the order was issued and were in fact given a hearing on that *same date*. Certainly neither the Orange County Superior Court nor Appellants can be blamed because Appellees, after requesting a hearing, declared themselves to be *beyond* the jurisdiction of the State court and though "not meaning any disrespect" refused to argue the merits of the obscenity issue.

The District Court found that the "objective facts" described in the opinion:

> . . . clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.

Appellants submit that four seizures under valid search warrants during a two-day period and followed by an adversary hearing are *not* "harassment" and "bad faith" within the clear meaning of *Younger v. Harris, supra,* and *Perez v. Ledesma, supra.* See also *Com. of Pa. ex rel. Feiling v. Sincavage,* 439 F.2d 1133 (3d Cir. 1971); *Robbins v. Bryant,* 349 F.Supp. 94, affirmed 474 F.2d 1342; *Boyd v. Hoffman,* 342 F.Supp. 787; *Summers v. McNamara,* 239 F.Supp. 806; *Wilhem v. Turner,* 298 F.Supp. 1335, affirmed 431 F. 2d 177, *cert. den.* 401 U.S. 947, 28 L.Ed.2d 230; *Fowler v. Alexander,* 340 F.Supp. 168, affirmed 478 F.2d 694; *Link v. Greyhound Corp.,* 288 F.Supp. 898; *Quinnette v. Garland,* 277 F.Supp. 999; *Haigh v. Snidow,* 231 F.Supp. 324; *Rhodes v. Huston,* 202 F. Supp. 624, affirmed 309 F.2d 959, *cert. den.* 383 U.S. 971, 16 L.Ed.2d 311.

B. Where, as Here, Criminal Proceedings Were Filed Against Plaintiffs Only Eight Days After the Court Was Impaneled and Were Pending at the Time Declaratory Judgment Was Considered, Abstention Is Mandated.

The Opinion of the Three-Judge Court (p. 8) states that it need not abstain from involving itself in this matter as there is no danger of duplicative proceedings or disruption of the state criminal justice system. This finding of the court is belied by the existence of the pending criminal charges.

The court's Opinion relies heavily upon *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209 (1974). The United States Supreme Court there specifically set out the focus of its holding in that case as follows:

> The case presents the important question reserved in *Samuels v. Mackell,* whether declaratory

relief is precluded when a state prosecution has been threatened but is not pending. . . . (94 S.Ct. 1213) (Citations omitted.)

The Federal court interpreted this to mean that the federal court could take jurisdiction if state proceedings had not been filed at the time the federal complaint was filed. The majority of the justices, however, have actually expressed agreement on the fact that the propriety of abstention is to be determined at the time of the *hearing*. The concurring opinion of Mr. Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82, 103, 27 L.Ed.2d 701, 716 (1971), which expresses the views of Mr. Justice White and Mr. Justice Marshall, specifies that:

> The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the *hearing* and not upon the situation when the federal suit was initiated. See *Golden v. Zwickler*, 394 U.S. at 108, 22 L.Ed.2d at 117. (Emphasis added.)

The concurring opinion of Mr. Justice Rehnquist (with whom the Chief Justice joined) in *Steffel v. Thompson*, 415 U.S. ...., 94 S.Ct. 1209, 1225-1226, indicates that:

> . . . any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*.

The limitation imposed on Mr. Justice Rehnquist's views by the concurring opinion of Mr. Justice White are to the effect that:

> . . . a federal suit challenging a state criminal statute on federal constitutional grounds could be

> sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

Where as in this case the criminal complaint as to the theater manager was filed on November 26, 1973, before filing of the federal complaint, and where as here, the criminal complaint was amended to include Appellees on Januarv 15—approximately seven days after impaneling of the three-judge court and *one month* before Appellants were notified that the court had in fact been empaneled—*Steffel, supra,* as well as all other prior decisions of this Honorable Court, mandate abstention.

C. Where, as Here, Interference With the State Criminal Proceedings Was Apparent and Unavoidable, Abstention Is Mandated.

The very principle upon which *Steffel, supra,* rests the propriety of issuance of a declaratory judgment in the instances therein contemplated, is the recognition that a declaratory judgment is "less abrasive" than an injunctive remedy and will have a "less intrusive effect on the administration of state criminal laws." The magnitude of the "intrusion" and its "abrasiveness" in the case at hand is readily apparent.

The three-judge court in taking *and maintaining* jurisdiction over the action and in issuing an injunction against further seizures of other movies has provided the defendants in state criminal proceedings with a ready-made scheme to bypass and literally thumb their noses at the state courts. Evidence in the custody of the state court and which is the basis of the criminal

proceedings is ordered returned. Although the defendants appear and answer to the state criminal charges they do so knowing that evidence of those charges will be gone at the time of trial. Although the defendants *demand* an adversary hearing prior to a seizure of additional copies, when the state court attempts to give them a hearing, they decline to appear, or if they do appear, they do so to tell the state court that they will not bother to argue the merits because the state court "lacks jurisdiction."

The duplications and contradictions involved are further evidenced by the direct conflict between the orders issued by the state courts and the order of the Federal court. The Superior Court judge held an adversary hearing and found the movie to be obscene. The seizures were held to be constitutional by a Federal judge (Judge Lydick). The Federal Plaintiff as defendant in the state criminal action moved to suppress as evidence and for the return of those same movies in the Orange County Municipal Court. The Orange County Municipal Court held two of the seizures invalid. An appeal from that order of the Municipal Court was duly filed and the appeal was pending before the state appellate court when the order of the three-judge court issued declaring the seizures to be "harassment" and ordering the movies returned. The Appellate Department of the Superior Court in due course issued an order in the criminal proceedings telling the municipal judge who holds the evidence and *who is subject to that order* that he cannot return the

films because they are properly seized and are contraband. The Orange County Superior Court orders an adversary hearing. Defendants walk out stating that the court lacks jurisdiction. After the hearing the Superior Court orders the seizure of all copies. The Federal court retaliates by threatening to hold the District Attorney and the Chief of Police in contempt and by countermanding the order of the Orange County Superior Court. Disruption of state proceedings!?!

In passim, it should be noted that the *one* truly important legal issue for determination in the state cases is whether after an adversary hearing a state court can order the seizure of additional copies of the film. A secondary but just as important legal question relates to the interpretation of California Penal Code Sections 1524-1540 as they relate to the holding of adversary hearings. Had the three-judge court refused to interfere, the Federal Plaintiffs would have litigated those issues where the issues belonged—in the state court proceedings. Instead they decided to ignore the fact that the order of seizure after adversary hearing is a *search warrant* and that the taking of evidence by the issuing magistrate is specifically provided for in California Penal Code Section 1526. They have conveniently blinded themselves to the fact that *each search warrant* is severely limited in scope and duration by those sections of the Penal Code and have optioned (understandably on their part) to argue "harassment" before a three-judge court who ends up as a court with apparent appellate jurisdiction over the Appellate Courts of the State of California.

By allowing the Appellees to argue the matter in the Federal Courts after their refusal to submit to the jurisdiction of the State Courts and to pursue their appellate remedy as to the jurisdictional issue prior to intervening, the Federal Court *presumed* and *assumed* inability on the part of all levels of State Courts to do justice. Since Appellees' original argument centered on the validity of State Statutes regulating searches and seizures, the action of the Federal Court had the further effect of obstructing the proper administration of justice by precluding an authoritative determination of the issue—a key issue in this case—by the California Appellate Court. Nor is federal intervention excused by need for speed since the California Appellate Court, Fourth Appellate District, has been consistent in its granting of *immediate* stays pending consideration of the merits of any issue of First Amendment importance. (Had the Federal Court taken evidence in this case, the testimony of the Court Clerk would have shown this to be true.) Appellants respectfully submit that the old and well-established concepts of comity strongly argue gross abuse of discretion on the part of the Federal Court in deciding to intervene under the circumstances of this case, an abuse that can only tend to encourage future similar actions and thus can only tend to encourage disrespect for the authority of a sister court—and for all courts—and lead to the very abuses decried by *Steffanelli v. Minard,* 342 U.S. 117, 123-34 (1951), and *Veen v. Davis,* 326 F.Supp. 116, 117 (C.D. Cal. 1971).

D. Where, as Here, the Complaint Seeks Recovery of Property in the Custody of a State Court of Prior Jurisdiction, Intervention by the Federal Court Is Prohibited.

In *Donovan v. Dallas,* 377 U.S. 408, 411, 12 L.Ed. 2d 409, 413 (1964), the Supreme Court points out that when the aim of the proceedings is property in the custody of a state court the proceedings are *in rem* or *quasi rem* proceedings. In such cases, the jurisdiction with the Court having custody is *exclusive:*

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson,* 305 U.S. 456, 456-468, 83 L. Ed. 285, 290-292, 59 S.Ct. 275.

Moreover, even where the state court and the federal court have concurrent jurisdiction, the first court issuing its decision does not and *cannot* enforce the judgment it renders by contempt or injunction. Rather, the opinion states the proper method of procedure to be as follows:

> In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Id.,* at 466, 83 L.Ed. at 291. See also *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.

To the same effect are *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 86 L.Ed. 100 (1941); *Purcell v. Summers*, 126 F.2d 390 (4th Cir. 1941) *cert. den.* 317 U.S. 640, 87 L.Ed. 516. See also *Phillips v. City of Atlanta*, 57 F.Supp. 588; *Downing v. Davis*, 34 F.Supp. 872; *White v. Crow*, 17 Fed. 98, affirmed 110 U.S. 183, 28 L.Ed 113 (1884).

In the case at hand, since all of the property to which the June 4 order to return is directed as well as the property sought to be returned *is* in the custody of the state court and is evidence in criminal proceedings, the Federal court order to return is jurisdictionally defective.

E. The Actions of Appellants Have Been Improperly Termed Harassment Because They Were Legal Actions Performed Under Validly Issued Orders of the State Court and in the Absence of Harassment the Court's Abstention Was Mandated.

The proposition that an official cannot be guilty of harassment when he legally performs his legal duty is obviously unquestionable, just as it is unquestionable that if the seizures were legal they cannot constitute harassment. Moreover, if a prosecutor honestly believes the law to be as he enforces it, and if his position is rational, he cannot be guilty of harassment. The jurisdiction of the state court to hold prior adversary hearings under authority of Penal Code Sections 1526-1540 is not in question.

Those statutes have always been interpreted as requiring the magistrate to make an immediate determination of the issue of obscenity at an adversary hearing. (*Cf. Zeitlin v. Arnebergh*, 59 Cal.2d 901; *Aday v. Superior Court*, 55 Cal.2d 789; *Aday v. Municipal Court*, 210 Cal.App.2d 229; *People v. Superior Court (Loar)*, 28 Cal.App.3d 600.) Under the requirements set

forth by this Honorable Court, an adversary hearing and a prompt final judicial determination of the issue of obscenity must be had *before* a seizure of all available copies pending trial can be ordered.

Within the purview of the California search and seizure statutes in compliance with the mandated First Amendment requirements, California magistrates can, upon affidavits supporting probable cause, issue a search warrant for the seizure of *one* copy of a film (Penal Code §1525). Under authority of Penal Code Sections 1540 and 1536, the courts are under a duty to ascertain whether the material is in fact contraband (*i.e.*, obscene) and to order the same returned forthwith if they find it to be not obscene. They can thus order the parties to appear before the court to determine that issue. If after a hearing the court finds the material to be obscene, the prior judicial determination requirement is satisfied and a warrant can issue for the seizure of all copies.

The reviewability and concomitant finality of the court's determination is shown by such cases as *Aday v. Superior Court, supra*, which hold that a Petition for Writ of Prohibition and a Petition for Hearing can be taken from such determination.

Plaintiffs have contended (and the three-judge court has apparently so held in light of their August 3, 1974, order to show cause *in re* contempt) that a *final judicial* determination of obscenity must be made at the trial and that only one copy can be seized prior to that time. The argument, Defendants contend, flies in the face of logic, common sense, *Aday v. Superior Court, supra*, and *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789. A defendant can avoid multiple seizures and prosecutions by *refraining* from showing a movie held to be obscene after an adversary proceeding until the jury

trial has been had, a period of not more than 40 days under California law unless at defendant's request. To hold otherwise is to say that a *judicial* determination is a meaningless act which allows the defendant to keep on committing that which the courts have determined to be a crime and which is, therefore, presumptively a crime.

Moreover, the clear meaning of the cases establishes a *judicial* not a jury determination. *Heller, supra,* as well as all of its precursors, do not speak of a *jury* determination but of a *judicial* determination of the issue of obscenity. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this Honorable Court expressly rejected the concept of a binding jury determination on the issue of obscenity. In that case the Court held that the *judges* have the *duty* to protect free expression by making an independent constitutional determination of obscenity of the materials before it and stated:

> Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

At note 3 of that same opinion, the United States Supreme Court concluded:

> It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.*

In compliance with the United States Supreme Court mandates, the California Supreme Court, in *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909, held that the *court* in each case *must* make an independent determination of the obscenity of the material and concluded:

> . . . we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact. The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guarantees of freedom of speech and freecom of the press (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and constitutional constitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.

The rationale of the California Court is best expressed in its statement that:

> The determination of what is obscene in the statutory or constitutional sense is not a question of fact (i.e., a question of what happened), but rather is a question of fact mixed with a determination of law; a "constitutional fact."

Aday v. Superior Court, 55 Cal.2d 789; *Aday v. Municipal Court,* 210 Cal.App.2d 229; and *People v. Superior Court,* 28 Cal.App.2d 600, show that a *judicial* determination of the issue of obscenity is to be had at a special hearing as soon as possible after seizure.

Allowing the jury to be the "definitive determinant" of the obscenity of the material is also contrary to presently articulated principles of law. As *Miller v. California, supra,* at note 9 recognizes:

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States, supra,* 354 U.S., at 492, n. 30 (1957), "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States,* 165 U.S. 486, 499-500."

Zeitlin v. Arnebergh, 59 Cal.2d 901, 907, points to the inconclusiveness of a jury verdict and states:

> A finding of guilt of one purveyor of obscene publications will not necessarily discourage others; indeed such vendors characteristically operate undercover and are inclined to recidivism. If, on the other hand, a verdict expresses a determination that the material is not obscene the city attorney is still free to prosecute another bookseller for selling the same publication. If a criminal verdict, whether of guilt or of innocence, operates primarily within a particular county to ban the book in the case of guilt, or to encourage its sale in the case of innocence, an opposite result might readily obtain in another country. Such an approach must inevitably engender a hodgepodge pattern of suppression and sale.

That same principle was recognized in *Bernard v. Municipal Court,* 142 Cal.App.2d 324, where the court, after a jury acquittal refused to return the materials because they were obscene.

United States v. West Coast News Co., 228 F.Supp. 171, affirmed 357 F.2d 855 (6th Cir. 1966), reversed on other grounds. 388 U.S. 447, 18 L.Ed.2d 1309 (1967) also supports appellants' contention. In that case defendant had been priorly tried and acquitted of a similar charge. After noting that the book had not been presented to the jury in the prior case, the court concluded that *even* if the book had been presented and *even* if the jury had acquitted him, neither double jeopardy nor *res judicata* were applicable because:

> . . . defendant Aday was not charged with the same offense in the District Court in California as that with which he is charged in this case. Besides the fact that the book, *The Black Night,* was never submitted to the jury, the indictment in that case charged transportation of that book to different places on different dates than the indictment in this case. See 18 U.S.C. §3237(a).

If the book had been submitted to the jury, and if the jury had acquitted defendant Aday on the count naming the book, *The Black Night, it would still be impossible to know whether or not the jury based its acquittal upon the fact of non-obscenity. It is as reasonable to assume that they may have acquitted defendant Aday on grounds of lack of scienter, or non-transportation.* (Emphasis added.)

That same court also points out that *each* act of mailing is a separately prosecutable offense and that:

In fact, the statutes involved in this case contemplate that a defendant may be acquitted for sending a book to one place, and found guilty for sending the same book to another place. Footnote 30 to the majority's opinion in the *Roth* case, *supra,* stated:

"It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States,* 165 U.S. 486, 499-500 [17 S.Ct. 375, 379-380, 41 L. Ed. 799]."

In *State v. Ell-Gee, Inc.,* 255 So.2d 542, for example, the Florida Court of Appeals held against Defendants who had made the following contention:

Essentially, appellees' reliance is upon its argument that the performance of a play, even though in violation of the several lewdness and obscen-

ity statutes and ordinances, is a continuing performance throughout its run and therefore constitutes but a single episode or transaction within the meaning of *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and consequently the conviction in the Municipal Court of Miami Beach foreclosed any prosecution for an earlier performance of the same play, under the Double Jeopardy Clause, of the Fifth Amendment, or under the Doctrine of Collateral Estoppel.

The Court, in rejecting Defendants' double jeopardy claim and in reversing the finding of the Court below, concluded:

Each performance of the play constituted a separate incident, transaction or episode even though the same words were spoken and the same exposure indulged in. We equate this activity with that of a bookmaker taking separate bets on separate days on any gambling activity, or a prostitute plying her activities day after day, or separate acts of incest committed with the same victim on separate days, or the uttering of a continuous series of forgeries on the same person's account in the same bank, or the shooting of a number of persons with the same gun during a single demonstration or uprising.

Here, each performance of the play presumably was before a different audience, so that the lewd and lascivious conduct or obscenity was portrayed at different times before different persons. The fact that the same words were used and the same lascivious conduct was indulged in does not convert the separate activities into a continuous transaction or continuing activity.

Steffel v. Thompson, Younger v. Harris, and *Perez v. Ledesma* make clear that harassment equals "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." Where, as in the case at hand, the procedures adopted have been found to be constitutional; where, as here, the law, though unsettled, argues in favor of the legality of Appellants' acts and in favor of the success of the prosecutions, several copies seized, each under a separate search warrant, cannot in and of themselves constitute harassment. Even before the July 25, 1974, *Miller v. California* decision by this Court, the allegation of harassment was improper and fictitious. After July 25, 1974, such an allegation (which must perforce imply a belief on the part of the prosecution that the California obscenity law is invalid) is wholly untenable. Absent proven harassment, the three-judge court abused its discretion in the exercise of jurisdiction and in granting any and all types of injunction.

F. The Validity of the Order of Injunction Issued by Judge Ferguson on August 3, 1974, Prohibiting Future Seizures Is Properly to Be Determined as Part of This Appeal.

Appellants are uncertain as to the exact nature of the injunctive order issued by the Court on August 12, 1974. Unquestionably, the order was issued in this case. Just as unquestionably it was issued by one of the members of the three-judge court. Moreover, the order is also unquestionably injunctive in nature. Since it is an injunctive order directly prohibiting the enforcement of a state statute by precluding the seizure of necessary evidence, the order is one which can only be issued by the three-judge court through the issuing judge or is a "writ of assistance" to effectuate the June 4 judgment. (It ob-

viously cannot be a temporary injunction since that was issued on August 3, 1974.) But, however termed, the validity of such an order is totally dependent on the validity of the June 4, 1974, judgment and becomes void and unenforceable when and if that judgment is vacated.

Although *one case, Hamilton v. Nakai,* 453 F.2d 152, 161 (9th Cir. 1971), holds such an order to be appealable to the Circuit Court of Appeals, that case does so under authority of *Hicks v. Pleasure House, Inc.,* 404 U.S. 1, 30 L.Ed.2d 1. That case with which Appellants are unfortunately familiar deals with temporary restraining orders issued *prior* to the convening of a three-judge court. Moreover, in that case, an appeal had already been had and the decision of the three-judge court had already been finally determined by this Honorable Court.

In a case such as the present one where the order is one which sets forth the "scope" of the prior order of injunction issued by the three-judge court, the order should be considered as *defining* the prior order and should be determined as part and parcel of the June 4, 1974, judgment from which this appeal is taken. This is especially true when issuance of the order was at the instigation of Appellees while consideration of an application for stay intended to avoid the issuance of just such an order was pending before this Court. Appellees, in return for being allowed to present their opposition to the application, were required to forego enforcement of the judgment pending a determination of the application for stay. Their failure to do so cannot be made to further damage Appellants by requiring them to conduct separate appeals.

Consideration of the order as one issued by the three-judge court in a case such as this has been advocated by Mr. Justice Harlan acting as circuit court judge in *Breswick and Co. v. United States of America,* 100 L.Ed. 1510, 1515, who, in granting a stay under somewhat similar circumstances, concluded:

> I find no substance to the plaintiff's contention that Alleghany's present application is premature. I am disposed to think that the signature of one judge to the injunction order, which conformed to the majority opinion of the three-judge court as to the scope of the injunction, satisfied the requirements of 28 USC §2284. However, if I am wrong, then consummation of the preferred stock plan would not violate a valid injunction order and the say whiich I am granting would be of no account.

Finally, the order of August 3, 1974, is so intimately connected with the validity of the June 4, 1974, order that a final determination as to the validity of that order also finally determines the validity of the August 3, 1974, order.

As *United States v. United Mine Workers of America,* 330 U.S. 258, 295 (1947), points out:

> The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worder v. Searls, supra* (121 U.S. at 25, 26, 30 L.Ed. 857, 858); *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.* (CCA 2d) 86 F. 2d 727 (1936); *S. Anargyros, Inc. v. Anargyros & Co.* (CC) 191 F. 208 (1911), and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court.

That same Court at note 61 points to the following additional authorities, all of which support Appellants' contentions:

> *Leman v. Krentler-Arnold Hinge Last Co.,* 284 U.S. 448, 453, 76 L.Ed. 389, 394, 52 S.Ct. 238 (1932); *Bessett v. W. B. Conkey Co.,* 194 U.S. 324, 329, 48 L.Ed. 997, 1002, 24 S.Ct. 665 (1904); *McCann v. New York Stock Exchange* (CCA 2d) 80 F.2d 211, 214 (1935). In accord in the case of settlement is *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 451, 452, 55 L.Ed. 797, 809, 810, 31 S.Ct. 492, 34 LRA(NS) 874 (1911): ". . . when the main cause was terminated . . . between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character."

III

The District Court Has Decided an Important Federal Question in a Manner Which Is in Direct Conflict With the Decision of the California Supreme Court, the California Appellate Court and of This Court.

The memorandum opinion of the District Court holds that California Penal Code sections 311, 311.2, *et seq.,* are unconstitutional under the criteria set forth in *Miller v. California.* Those same statutes have been held to be constitutional as interpreted by the California Appellate Court in *People v. Enskat,* 35 Cal. App.3d 900. After the District Court opinion had issued the California Supreme Court has reaffirmed the *Enskat* decision by denying a petition for Writ of *Habeas Corpus* in the case of *In re Kroomer* and specifically mentioning *Enskat* as the basis for the denial.

On July 25, 1974, the Supreme Court issued its decision in the case of *Marvin Miller v. State of California*, No. 73-1508.

The majority opinion there states:

> The appeal is dismissed for want of a substantial federal question.

The dissent written by Mr. Justice Brennan recites that:

> Appellant was convicted in Orange County, California Superior Court of disturbing obscene matter in violation of California Penal Code §311.2. . . .

After setting forth the text of the California Obscenity Statutes, the dissent goes on to say:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of *Miller v. California*, 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context, the decision, therefore, makes clear that this is a conviction under the California Obscenity Statute reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra*, requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price*, 360 U.S.

246, 3 L.Ed.2d 1200, 1203 (1959), where the Court concludes:

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .

Such a determination on the merit, of course, makes the case controlling as precedent. (See *Eaton v. Price*, 360 U.S. 246, 247, 3 L.Ed.2d 1200, 1202, 79 S.Ct. 978 [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.*, 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459 P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review*, 64 Colum.L.Rev. 1, 11) and of value as precedent under the doctrine of *stare decisis. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.*, 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc v. McGinley*, 179 F.Supp. 944, 949, fn.4, revd. on other grounds, 366 U.S. 582, 6 L.Ed.2d 551, 31 S.Ct. 1135.)

As pointed out by *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972), the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. §1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States and the decision is in favor ot its validity.

Quite clearly a dismissal for want of a substantial federal question comports with it a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit. (The United States Court of Appeals for the Ninth Circuit has so held in *Cross v. Bruning,* 413 F.2d 678 (9th Cir. 1969)).

IV

The Three-Judge Federal Court Has Determined an Important Issue Which Has Never Been Conclusively Decided by This Honorable Court in a Manner Which Appears to Be in Conflict With the Opinions of This Honorable Court.

In *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209, 1221 this Honorable Court differentiated between Federal court intervention by way of a declaratory judgment and by injunction. The *Steffel* opinion reiterates the *Perez v. Ledesma, supra,* rationale, and concludes that Federal court interference by way of declaratory judgment is proper because the *effect* of a declaration of unconstitutionality by the Federal court does not preclude future prosecutions. On the contrary:

> . . . where the highest court of a State has had an opportunity to give a statute regulating expression of a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prose-

> cution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. . . . [T]he federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the govering rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt. (Footnote omitted.)

Although the meaning of the majority opinion does strongly imply that where as in the case at hand an intervening decision by this Honorable Court shows the statute to be constitutional, the prosecutor can rightfully and with immunity, enforce that law (*cf.* the concurring opinion by Mr. Justice Rehnquist and the Chief Justice), the concurring opinion of Mr. Justice White implies that the court "might" feel otherwise. Mr. Justice White in fact states:

> It should be noted, first, that his [Mr. Justice Renquist's] views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

The issues left undecided by the above decision are very much in issue in the present case.

Although the three-judge court issued only one official opinion, it had before it several other cases involving San Bernardino, Riverside, San Diego and Los Angeles counties as well as some cities within those counties. In each of those cases the three-judge court issued orders stating that all those cases were controlled by the *Miranda v. Hicks* decision.

Cecil Hicks, Oretta Sears and the Buena Park Police Department, therefore, though necessarily more visible by virtue of selection of their case for adjudication, are not the only persons affected by the undetermined scope of the injunction and coercive nature of the decision. Although it may well be that if this Honorable Court does not grant relief, the Appellants herein will be the only ones to suffer personal hardships and monetary damages, unless relief is granted by this Honorable Court no prosecutor, or judge in the state system, for that matter, will be able to honestly enforce the very laws this Court has declared to be constitutionally valid without being faced by the most unpleasant, indeed, frightening specter of "contempt of federal court". The independence of the state court system is also at issue in a very real sense. The state courts whose orders are being flaunted by defendants have indicated by their heretofore entered decisions that they will not release items which are evidence in their criminal proceedings and duly adjudicated by them to be contraband. Since their jurisdiction preceded that of the Federal court, return of the items in their custody could only be mandated by a court of higher jurisdiction on appeal from the criminal proceedings. Prosecutors all over the state will thus be in the unenviable position of being unable to comply with the orders of the Federal court.

It is possible that the methods of seizures used by Appellants (seizure of more than one copy after adversary hearing) might be eventually held to be improper, but since the impropriety if any, relates to the construction of state statutes (California Penal Code sections 1526-1540) any interpretation must come first from the state courts.

Finally, the principle that a citizen should not be made to undergo criminal proceedings to test the validity of a state law—the very principle underlying the *Steffel* opinion, requires that state prosecutors and police officers who act pursuant to orders issued by state courts not be made to suffer contempt charges and taxing Federal court suits because of the vagueness of what is the effect of a federal declaratory judgment. The constitution requires that the magistrate, not the police officer, not the prosecutor, determine when and if a warrant shall issue. And the magistrate who honestly performs his duty can be told that he is legally wrong by a court of *higher* jurisdiction. He cannot be sued for his honestly mistaken beliefs of what the law is.

By the same token, the law requires the prosecutor to act legally, that is, to go to the magistrate and to make application for search warrants and for hearings. That is the duty of the prosecutor and the scope of the prosecutor's authority. If by acting in compliance with the law and during the performance of his legal duty he can be subjected to repeated federal suits, charges of harassment, threats of contempts, the rights of the People of the State, the very People the constitution is intended to protect, will be seriously impaired for want of aggressive and honest prosecution.

Conclusion.

From all the above reasons, Appellants most respectfully invoke the jurisdiction of this Honorable Court.

Dated this 16th day of August, 1974.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General, State of California,

JACK WINKLER,
Chief Assistant Attorney General,

HARLOW SMITH,
Assistant Attorney General,

ALVIN KNUDSON,
Deputy Attorney General,

RONALD H. BEVINS,
City Attorney, City of Buena Park,

CECIL HICKS,
District Attorney,
County of Orange, State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,
Head, Writs & Appeals Section,

P.O. Box 808,
Santa Ana, Calif. 92702,
(714) 834-3600,
Attorneys for Appellants.

APPENDIX A.

Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974

Before: Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

PER CURIAM.

The primary issue presented is whether the California obscenity statute as interpreted by the state courts of California meets the constitutional standards mandated by the Supreme Court in *Miller v. California,* 413 U.S. 15 (1973). We hold that it does not.

The facts which give rise to the litigation are as follows:

1. On November 20, 1973, anticipating that the movie "Deep Throat" would be exhibited in the City

of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arrangements made for a judge of a Municipal Court to view the film if it was brought to Buena Park.

3. At 12:30 p.m. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers, acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to be seized, the warrant also contained the following handwritten addition:

> "Money contained in the ticket booth & specifically for a $20.00 bill Ser. # B08574869B."

All the cash in the box office was seized, an amount shown to be $305.00.

7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the second warrant was an identical copy of the first, but also contains the following handwritten notation:

> "Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge ..... with the exception of certain portions being edited different than the first film seized.
>
> Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film."

8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of "Deep Throat" was seized, along with some advertising posters.

9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: "Money contained in the ticket booth cash drawer." $159.00 in cash was seized from the box office.

10. The theatre obtained yet another copy of "Deep Throat." At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

> "Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge .... who issued a search warrant.

Your affiant states that the film in question is the same film viewed by Judge ..... with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge ....

Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge ..... and numerous small changes at different portions of the film."

11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to execute the warrant, and a third copy of the film was seized.

12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: "All monies on premises received, in cash drawers or safes at above location." The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: "All monies received, in cash drawers or safes."

15 The warrant was served, and another copy of "Deep Throat", some promotional posters and $197.18 in cash were seized.

16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film.

Plaintiffs in this action are the theatre owner, his property-holding company, and the theatre corporation itself. No criminal complaints are pending against any of them.

Defendants are the District Attorney of the County of Orange, a deputy district attorney, the Chief of Police of the City of Buena Park, and three officers of the Buena Park Police Department.

Plaintiffs filed this lawsuit, basing jurisdiction on 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. In their complaint they seek the return of the motion picture prints seized by defendants, as well as their cash proceeds. In addition, plaintiffs also seek a declaratory judgment under 28 U.S.C. § 2201 and 2202 that California Penal Code §§ 311, 311.2 and 311.5[1] are unconstitutional.

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[1] § 311. *Definitions*

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representations of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is

(This footnote is continued on next page)

Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are

designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

§ 311.2 *Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state*

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311.5 *Advertising or promoting sale or distribution; solicitation.*

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

threatened. However, it is clear that they do present a real and actual controversy, and do have standing to challenge the constitutionality of the California obscenity statute, since defendants have seized and continue to hold property of the plaintiffs, property which was seized solely because of alleged violations of the California obscenity statute. The Supreme Court has expressly held that a federal court's jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is not diminished by any distinction between personal and property rights. See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

The Obscenity Statute Abstention

The validity of the California obscenity statute (California Penal Code § 311, et seq.) was not determined by the Supreme Court in *Miller v. California, supra.* The Court, in determining a definition of obscenity which falls outside the protection of the First Amendment, permitted judicial construction of obscenity statutes so that even though the statute on its face violated *Miller,* it may fall within *Miller* by judicial construction. Obviously in *Miller* the Supreme Court did not have the benefit of such construction.

However, since *Miller,* the California courts have authoritatively construed the California statute with regard to *Miller.*

In *People v. Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), *hearing denied* by the California Supreme Court October 24, 1973, the California Court of Appeal determined that the California statute meets the test of *Miller.*

The defendants assert that *Enskat* is now the law in California. *Auto Equity Sales Inc. v. Superior Court,* 57 Cal. 2d 450 (1962) makes it clear in California that the decision rendered by the California Court of Appeal, Second District, Division Five in *Enskat* is ". . . binding upon all the justice and municipal courts and upon all the superior courts of this state, *id.* at 455. Likewise, although a denial of hearing by the California Supreme Court ". . . is not to be regarded as expressing approval of the propositions of law set forth in the opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the California Supreme Court], [citations], it does not follow that such a denial is without significance to [that Court's] views," *Di Genova v. State Board of Education,* 57 Cal. 2d 167, 178 (1962). A denial of hearing ". . . stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by [the California Supreme Court] or until change of the law by legislative action." *Amaya v. Home Ice, Fuel & Supply Co.,* 59 Cal. 2d 295, 306 (1963), quoting from *Cole v. Rush,* 45 Cal. 2d 345 (1955). See also *Klingebiel v. Lockheed Aircraft Corp.,* .... F. 2d .... (9th Cir. Feb. 20, 1974), Slip Opinion at p. 2 n. 2, citing *Stover v. New York Life Insurance Co.,* 311 U.S. 464 (1940). Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded.

In *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971), the Supreme Court recognized that principles of equity, comity and federalism necessarily limited a federal court's power to issue an injunction or a declaratory judgment when a state prosecution was pending. In *Steffel v. Thompson,* .... U.S. .... (March 19, 1974), however, the Court made it clear that neither *Younger* nor *Samuels* governed the situation in which there was no pending state prosecution. When, in that instance, the relief sought is declaratory in nature, and jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the federal courts have been assigned a "paramount role" in protecting constitutional rights. *Steffel,* Slip Op. at 20.

The situation presents no danger of "duplicative proceedings or disruption of the state criminal justice system," *Steffel* at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, *Steffel* at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in *Miller v. California, supra,* requires this court to pay due regard to the state judicial interpretation of the state as well. Finally, the fact that there, may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief. *Steffel* at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim.

Constitutionality

In *Miller,* the standards that state obscenity statutes must meet to comply with the First Amendment are:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The Court stated, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

The issue presented is whether the California statute "as written or construed" specifically defines proscribed sexual conduct. The Court in *Miller* for the first time in its long struggle to define that obscenity which is outside the protection of the First Amendment, adopted a Fifth Amendment fair notice rule. It has long been an established rule of Due Process that no person may be subject to criminal prosecution without "fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617 (1954); see also *Bouie v. City of Columbia,* 378 U.S. 347, 350-51 (1964); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939).

Miller states "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is clear that the California statute on its face does not meet the sound test of *Miller,* since it does not specifically define the sexual activity which is prohibited. As it reads, there is no fair notice what California permits or prohibits.

There is dispute among law enforcement officials whether the legislature of California could ever draft a statute which meets the test. The County Counsel for

the County of Los Angeles in another case pending before this court has stated:

> "The argument of the plaintiff requiring specifically enumerated sexual activity in order to make the obscenity statutes constitutional, must fail because legislatures can't be expected to enumerate and define every possible activity about a perversion known to humans regarding sexual activity. Under the maxim of expression unius est exclusio alterius, plaintiffs' argument would allow certain obscene sexual conduct to be exhibited if it was inadvertently omitted by the Legislation." (*Monica Theater, Inc., et al. v. Evelle J. Younger, et al.,* Case Number 70-2167-ALS. Defendant's Brief, filed November 30, 1973 at p. 2.)

The Court in *Miller* recognized the concern expressed here by Los Angeles' Deputy County Counsel when it stated "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'" 413 U.S. at 27, n. 10.

The California Court of Appeal in *Enskat* impliedly conceded that the statute as written does not meet *Miller.* It stated, however, that the statute has been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. (At least one federal court has declined to consider the validity of a state obscenity statute solely on the basis of past state cases without the benefit of a post-*Miller* state court analysis. *United Artists Corp. v. Harris,* 363 F. Supp. 857 (W.D. Okla. 1973).) Given the particularities that the California statute is missing on its face, it may be that such an undertaking would go beyond

the pale of judicial construction and cross over into the realm of legislative drafting. For the moment, however, this court need only address itself to the judicial construction put forth in *Enskat*.

In reaching their conclusion the state court cited *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1968); *People v. Noroff*, 67 Cal. 2d 791 (1967); *People v. Cimber*, 271 Cal. App. 2d Supp. 867 (1969); and *Landau v. Fording*, 245 Cal. App. 2d 820 (1966). While reference was made in at least two of those cases to sexual acts there involved, none of the state court opinions attempted to delineate standards of obscenity based on specific conduct.

The analysis of those cases that emerges in *Enskat* is that: (1) only "hard core pornography" is prohibited; (2) nudity, absent a sexual activity is not obscene; and (3) the material must contain a "graphic description of sexual activity." It is clear that the "fair notice" test of *Miller* is not met.

The term "hard core pornography" is no more precise than the term "obscenity." *Jacobellis v. Ohio*, 378 U.S. 184 at 201 (1964).

Likewise the mere language "graphic description of sexual activity" does not meet the specificity test. The Court stated "as a result, we now confine the permissible scope of such regulation to words which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law*, as written or authoritatively construed." *Miller* at 24 (emphasis added). In order to comport with due process, the criminal obscenity statute here must give fair notice of what conduct is criminally proscribed, *United States v. Harriss, supra*, and the Supreme Court in *Miller*, by outlining its criteria for "obscenity", has authoritatively indicated what a statute, in its language or its judicial construction, must have to be constitutional. *Enskat* and the cases cited therein have not supplied a description of specific sexual conduct "as definitely as if it had been so amended by the legislature", *Winters v. New York*, 333 U.S. 507, 514 (1948). *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

In addition to those cases cited by the Court of Appeal in *Enskat*, *People v. Sarong Gals*, 27 Cal. App. 3d 46 (1972); *People v. Adler*, 25 Cal. App. 3d Supp. 24 (1972) and *Dixon v. Municipal Court*, 267 Cal. App. 2d 789 (1968) have been brought to the court's attention as bearing on the construction of § 311. *Sarong Gals* involved a civil suit, an in rem action brought under the Red Light Abatement Act, California Penal Code §§ 11225-11235, and the construction of the statutory term "lewdness'; that case is inapplicable to the issues here. *Dixon* involved the lifting of a writ of prohibition and a remand to the municipal court, holding that the fact that there may have been "simulation" of sexual acts did not bar a finding of obscenity as a matter of law. As the Court there noted, however: ". . . [in] the case before us, we do not have testimony of what was actually done, because prosecution was barred by the writ." 267 Cal. App. 2d at 793. *Adler*, like some of the cases cited in *Enskat*, makes a passing and somewhat vague reference to sexual acts described in the book that was the subject of the action. As with all the cases referred to, however, there is no attempt by the courts of the State of California to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon *any* specific acts.

The California Court of Appeal, in deciding *Enskat*, also noted that the statute as presently written imposed "more strict requirements on the prosecution as to the definition of obscenity", because it retains the "utterly without redeeming social value" or *Memoirs* test which the Supreme Court disavowed in *Miller*. The California Court of Appeal correctly noted that imposing more strict standards on the government than are required by the Constitution would not make a statute unconstitutional. From that proposition, however, the state court then derived a decision of questionable logic: since the Supreme Court obviously intended to make it "easier" to prosecute obscenity cases after *Miller*, and since it is harder to meet the California standard of "*utterly* without redeeming social value" than it is to meet the new test of "lacks serious literary, artistic, political, or scientific value", then the state is not bound to "require increased specificity" in the law. *Enskat* at 911. This "trade-off" argument is particularly specious. First, the social value test is only one portion of the overall standard developed by the Supreme Court; isolating one portion of the test cannot cure the defects of the whole test. (It is clear that there can be "sexual activity" which is utterly without redeeming value which is so innocuous as to not be included on a list enumerated by a legislature.) Secondly, the zealous inquiry into the "intent" of the Supreme Court reveals nothing that would justify the contention that it is now supposed to be "easier" to convict purveyors of sexually-oriented materials. The Court in *Miller* set forth important First and Fifth Amendment principles central to a fair and reasoned system of criminal law, and not a statement of disapproval of works with a sexual theme.

Finally, it has been suggested that footnote 7 in *United States v. 12 200-foot Reels of Film*, 413 U.S. 123 (1973) permits the type of construction urged upon the court today. If the Supreme Court by that passing reference was announcing new boundaries for the legislative and judicial domains, it is clear that it at best applies only to the particular power the Supreme Court has to construe federal statutes. Without more, that narrow statement can be of no relevance to this determination. For the example of another court unwilling to construe this footnote as an invitation to repose legislative power in the judiciary, see the opinion of the Louisiana Supreme Court in *Louisiana v. Shreveport News Agency, Inc.*, 42 U.S.L.W. 2344 (Jan. 8, 1974).

In summary, we find (1) the California obscenity statute as written does not meet the specificity test of *Miller* and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited.[2]

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[2]This finding comports with the following decisions which have held the statutes in other states not to comply with the mandate of *Miller:*

New Jersey
Hamar Theaters, Inc. v. Cryan, 13 Cr.L. 2449, United States District Court for the District of New Jersey (July 26, 1973).

Massachusetts
Commonwealth v. Horton, Commonwealth v. Capri Enterprises, Inc., and *Essex Theatre Corp. v. Police Commissioner of Boston*, Massachusetts Supreme Judicial Court (April 23, 1974).

Louisiana
Louisiana v. Shreveport News Agency, Inc., 42 U.S.L.W. 2344, Louisiana Supreme Court (January 8, 1974).

Iowa
State v. Cahill and Wedelstadt (No. IM2-261), District Court, Linn County, Iowa (August 13, 1973).

(This footnote is continued on next page)

Injunctive Relief

In addition to the prayer for declaratory relief regarding the constitutionality of the statute, plaintiffs seek injunctive relief requiring the return of their seized property. In *Steffel* the Court held that requests for injunctive and declaratory relief must not be treated as a single issue.

Since there are no allegations that criminal prosecutions are pending or threatened, plaintiffs have not asked this court to stay any state criminal actions. It was that sort of injunctive relief with which the Supreme Court was faced when formulating rules of abstention in *Younger v. Harris, supra, Samuels v. Mackell, supra,* and *Perez v. Ledesma,* 401 U.S. 82 (1971).

Plaintiffs here merely seek the return of their seized property. Although equitable in nature, that relief is markedly different from an order which would force a state criminal court to stay its proceedings. While requiring the state to return four copies of the film and approximately $5,000 in gate receipts might have some disruptive influence on a possible future prosecution, or upon prosecutions of others, it is less harsh an interference than a direct injunction against a state proceeding. Nevertheless, for purposes of this analysis, this court will treat this prayer for injunctive relief as any other.

Cases of this sort can often involve dual requests for both injunctive and declaratory relief. See, for example, *Perez v. Ledesma, supra* (separate opinion of Brennan, J.). *Younger v. Harris* addressed itself solely to a rule

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North Carolina
State v. Bracken (72 CR 26502) and *State v. Cox* (72 CR 26503), Superior Court in Greensboro, North Carolina.
Indiana
Stroud v. Indiana (570 S 107) and *Mohney v. Indiana* (471 S 94), Supreme Court of Indiana (August 21, 1973).

for injunctive relief when a prosecution was pending. In *Samuels v. Mackell,* plaintiffs sought declaratory relief when a prosecution was similarly pending. The recent case of *Steffel v. Thompson, supra,* formulated standards for declaratory relief when no prosecution was pending, but specifically declined to rule on whether injunctive relief is appropriate in such an instance. *Id.* at 10. This court is now faced with that situation in which the Supreme Court has yet to act.

The perimeters of such a rule of law are still unclear; whether the strict doctrine of *Younger* would apply or not when there is no pending prosecution has been seriously questioned. See Note, Implications of the *Younger* Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending, 72 Colum. L. Rev. 874 (1972) at 895 and cases collected therein. At least one court has indicated that federal relief is more appropriate when, as here, the state statute is attacked on its face. *Jones v. Wade,* 479 F.2d 1176 (5th Cir. 1973) (Wisdom, J.).

Those questions, however, are of only minor importance to this court, since all the elements necessary for injunctive relief under *Younger* are present here. First, the question of whether these plaintiffs have standing and present a justiciable controversy has already been discussed. This court need only reiterate that defendants are now holding a significant amount of money in which plaintiffs claim a present property right. Second, the posture of § 311 as construed by the California courts is such that it is unlikely the injury could be remedied by a defense in a criminal prosecution. The admonition of abstention in *Younger v. Harris* must be viewed in light of the fact that the statute involved there (the California Syndicalism Act) had never been reviewed by the state courts since the Su-

preme Court had overruled *Whitney v. California,* 274 U.S. 357 (1927) by its decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). A defendant then faced with a prosecution for violating that Act could have set up a defense based upon the unconstitutionality of the statute.

By way of contrast, the California obscenity decision has been finally reviewed in the light of *United States v. Miller*. The construction of § 311 rendered in *Enskat* has effectively foreclosed relief in the state courts.

Finally, the objective facts set forth in the first part of this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effective exorcise the movie "Deep Throat" out of Buena Park.

The gravamen of the defendants' justification is, of course, that the property is contraband, both the evidence and the fruit of an illegal activity. Such a justification, however, dissipates in the face of a declaration by this court that the statute is invalid.

Pursuant to the provisions of Rule 52(a) this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to the provisions of Rule 58 a separate judgment shall be prepared and entered which shall provide as follows:

1. The California obscenity statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California,* 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED: June 4, 1974.

/s /Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Separate Judgment Pursuant to Rule 58 of the Federal Rules of Civil Procedure.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974.

Before: Honorable Walter Ely, Circuit Judge, Honorable William C. East, and Honorable Warren J. Ferguson, District Judges.

The court having heretofore issued its memorandum opinion, said opinion constituting its findings of fact and conclusions of law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure,

IT IS DECREED as follows:

1. The California Obscenity Statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED this 4th day of June, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX B.

Order.

United States District Court, Central District of California.

Vincent Miranda, etc., et al., Plaintiffs, vs. Cecil erties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. No. 73-2775-LTL.

Filed: Dec. 28, 1973.

This matter is before the Court on the application of plaintiff corporation, who operates a motion picture theatre known as the Pussycat Theatre in Buena Park, California, and plaintiff Miranda, who owns the land on which the theatre is located, for a temporary restraining order. The temporary restraining order seeks to require defendants Cecil Hicks, District Attorney of the County of Orange, State of California, Oretta Sears, Deputy District Attorney of the same County, Dudley D. Gourley, Chief of Police of the City of Buena Park and City of Buena Park Police Officers Arthur Fontecchio, Richard Hafdahl and Daniel Harrison to return three of four prints of the film "Deep Throat" seized

by certain of the defendants from plaintiff corporation's theatre, to enjoin further seizures of additional prints that plaintiff corporation may show at its theatre and to return certain cash impounded at the time of the seizure of the above-noted prints pending hearing on a requested order to show cause seeking similar relief on a more permanent basis and the convening of a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284 to hear the claims raised in plaintiffs' complaint.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1343(3) and (4) and 42 U.S.C. Section 1983.

The record before us shows that on November 23 and 24, 1973 law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code Sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.

Thereafter on November 26, 1973 defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973 at which these plaintiffs and others appeared

by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. The temporary restraining order sought by plaintiffs is denied.

The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The Clerk of this Court will serve a copy of this Order by United States mail on counsel of record for the parties.

DATED: December 28, 1973.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States District Judge

APPENDIX C.

Order to Show Cause and Temporary Restraining Order.

United States District Court, Central District of California.

Vincent Miranda, etc., et al., Plaintiffs, vs. Cecil Hicks, etc., et al., Defendants. Civil No. 73-2775-F.

The Court, having read and considered the Application for a Temporary Restraining Order and Order to Show Cause for a civil contempt, and the Affidavit of DAVID M. BROWN in support thereof, and

It appearing that Defendants, having been duly served with the judgment of this Court entered on June 4, 1974, have failed and refused to return to Plaintiffs four copies of the motion picture film "Deep Throat," as ordered by this Court in its said judgment of June 4, 1974, and no stay of said Order having been obtained by Defendants; and

It appearing that Defendants have seized or caused to be seized 7 additional complete prints of the said film "Deep Throat" from Plaintiffs' theatre subsequent to July 29, 1974, and have seized 3 complete prints of the film "Devil In Miss Jones" from Plaintiffs' theatre subsequent to July 29, 1974; and

It appearing that the aforesaid conduct is in violation of the judgment entered in this action on June 4, 1974, and that the said additional seizures are calculated to prevent the exhibition to the public by Plaintiffs of the aforesaid motion picture films, contrary to

the provisions of the First and Fourteenth Amendments to the United States Constitution; and

It appearing that the aforesaid conduct of the Defendants was undertaken in bad faith and for the purpose of harassment, and is causing Plaintiffs great and immediate irreparable injury; and

It appearing that Defendants, through their counsel, have been notified on Plaintiffs' intention to apply for a Temporary Restraining Order; and

It appearing from all of the foregoing, and from all the files and records in this action, that this is a proper case in which to issue a Temporary Restraining Order;

IT IS HEREBY ORDERED that Defendants, CECIL HICKS, ORETTA SEARS, DUDLEY D. GOURLEY, ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, show cause before this Court, located at 312 North Spring Street, Los Angeles, California, in the Courtroom of the Honorable WARREN J. FERGUSON, on August 12, 1974, at 10 A.M., or as soon thereafter as counsel may be heard, why:

1. A Preliminary Injunction should not issue, requiring Defendants, their agenst and employees, and all other persons in active concert and participation with the Defendants, to deliver forthwith to Plaintiffs all prints of the motion picture films "Deep Throat" and "Devil In Miss Jones" which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California subsequent to July 29, 1974;

2. A Preliminary Injunction should not issue restraining Defendants, their agents and employees, and all persons in active concert and participation with them, from seizing any additional copies of the said films from Plaintiffs' theatre, and from commencing or carrying on any criminal prosecutions against Plaintiffs or their employees pursuant to California Penal Code §§311, *et seq.;*

3. Defendants, and each of them, should not be found in contempt of this Court for failing and refusing to return to Plaintiffs four previously seized copies of the said motion picture film "Deep Throat," which this Court ordered said Defendants to return to Plaintiffs by judgment entered on June 4, 1974;

4. Defendants should not be required to pay damages to Plaintiffs for such contempt;

IT IS FURTHER ORDERED that, pending hearing on the Order to Show Cause, or further order of this Court, the said Defendants, and their agents and employees, and all persons in active concert or participation with them,

1. Deliver forthwith to Plaintiffs all prints of the motion picture films "Deep Throat" and "Devil In Miss Jones" which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California subsequent to July 29,1974; and

2. Are enjoined from seizing any additional copies of the films "Deep Throat" and "Devil In Miss Jones" from Plaintiffs theatre in Buena Park, Calif.

3. Are enjoined from commencing or carrying on any criminal prosecutions against Plaintiffs, or their employees, pursuant to California Penal Code §§311, *et seq.;* and

IT IS FURTHER ORDERED that a copy of this Order to Show Cause and Temporary Restraining Order, together with the Application for a Temporary Restraining Order and Order to Show Cause, and supporting Affidavit, be served on the said Defendants on or before the hour of 2 P.M., on the 5th day of August, 1974.

DATED: August 3, 1974.

/s/ Warren J. Ferguson
UNITED STATES DISTRICT JUDGE

APPENDIX D.

Entered in the Register of Actions on July 26, 1974; W. E. St. John, County Clerk, by H. J. Gallagher, Deputy.

Filed: July 26, 1974.

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Appellant, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I and John Doe II, Defendants and Respondents. No. AP-1594.

On Appeal from the Municipal Court of the North Orange County Judicial District, Hon. Max Eliason, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the order to suppress pursuant to Penal Code Section 1538.5 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby reversed, *Aday v. Superior Court* (1961), 55 Cal. 2d 789. The requisite prompt adversary determination of obscenity under *Heller v. New York* (1973), 93 S.Ct. 2789, has been held. *Furthermore, for purposes of the 1538.5 and 1539-40 Penal Code* motion, defendants have not urged non-obscenity of the film.

The cause is remanded to the Municipal Court for further proceedings.

Dated this 26th day of July, 1974.

/s/ Kneeland
KNEELAND
Judge

/s/ Judge illegible
JUDGE

/s/ Lee
LEE
Presiding Judge

[Seal]

APPENDIX E.

§ *311.* [*Definitions.*] As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its

prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance. [1961 ch 2147 § 5; 1969 ch 249 § 1; 1970 ch 1072 § 1; former § 311 repealed 1961 ch 2147.] *3 Cal Jur 3d Amusements and Exhibitions § 11, 13; Cal Jur 2d Cl & D § 6, Decl R §9, False Imp § 10, Grand J § 23, Lewd §§ 2-5; Witkin Crimes pp 500, 501, 503, 504, 505.*

§ *311.2* [*Sale or distribution, etc., of obscene matter.*] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed. [1961 ch 2147 § 5; 1968 ch 399 § 1; 1969 ch 249 § 2.] *3 Cal Jur 3d Amusements and Exhibitions § 13; Cal Jur 2d Lewd §§ 2, 4; Witkin Crimes pp 503, 504; Evidence 2d, 1972 Supp p. 118.*

§ *1526.* [*Examination by magistrate of complaints, etc.: Affidavit: Subscription.*] (a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing,

and cause same to be subscribed by the party or parties making same.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court. [1872; 1957 ch 1882 § 1; 1970 ch 809 § 1; 1972 ch 662 § 1.] *Cal Jur 2d Search § 14; Witkin Evidence p 132.*

§ *1536.* [*Retention of property taken.*] All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable. [1872; 1903 ch 73 § 1; 1957 ch 1885 § 2.] *Cal Jur 2d Search §§ 16, 19; Witkin Evidence p 134.*

§ *1539.* [*Taking of Testimony: Transcripts.*] (a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person who is

not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe his shorthand notes pursuant to this section if any party to a special hearing in the superior court files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the county clerk shall deliver the original of such transcript so filed with him to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand by him without cost to him. [1872; 1967 ch 1537 § 2.] *Cal Jur 2d Search §§ 15 et seq., 56, 60; Witkin Evidence pp 63, 134, 135, 136.*

§ *1540. Property, when to be restored to person from whom it was taken.* If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [1872.] *Cal Jur 2d Search §§ 15 et seq., 56, 60; Witkin Evidence pp 63, 65, 134, 135.*